No. 82212-3

SANDERS, J. (dissenting)—RCW 47.12.063(2)(g) conditions the sale of surplus Department of Transportation (DOT) land on written notice to all abutting landowners. This case does not turn on whether DOT's sale fell within its realm of power. The more appropriate question is whether DOT's sale of land *without notice* fell within its realm of power. DOT's sale to Sustainable Urban Development #1, LLC (SUD) was ultra vires. South Tacoma Way, LLC (South Tacoma) was entitled to notice and a public auction.[1] I dissent.

I. Ultra Vires

Ultra vires means "[u]nauthorized; beyond the scope of power allowed or granted." Black's Law Dictionary 1662 (9th ed. 2009). "Ultra vires acts are those

[1] The majority declines to analyze standing. Majority at 4 n.2. Because I would find for South Tacoma, however, it should be addressed briefly here. South Tacoma enjoys standing on at least two independent grounds. First, standing exists because the previous property owner, who owned the property at the time DOT sold to SUD, assigned any and all claims and causes of action to her successors. *See, e.g., Styner v. England*, 40 Wn. App. 386, 389-90, 699 P.2d 234 (1985). Second, under the Uniform Declaratory Judgments Act (UDJA), an action will be allowed for a "person . . . whose rights, status or other legal relations are affected by a statute . . . ." RCW 7.24.020. South Tacoma meets the UJDA's criteria. Accordingly we properly consider South Tacoma's claims.

done 'wholly without legal authorization or in direct violation of existing statutes.'" *Metro. Park Dist. of Tacoma v. State*, 85 Wn.2d 821, 825, 539 P.2d 854 (1975) (quoting *Finch v. Matthews*, 74 Wn.2d 161, 172, 443 P.2d 833 (1968)). The unauthorized contracts of governmental entities are rendered void and unenforceable under the ultra vires doctrine. *Chem. Bank v. Wash. Pub. Power Supply Sys.*, 99 Wn.2d 772, 797, 666 P.2d 329 (1983). The ultra vires doctrine applies to the actions of municipal corporations. *Noel v. Cole*, 98 Wn.2d 375, 379, 655 P.2d 245 (1982). "Even where a contract is within an agency's substantive authority, failure to comply with statutorily mandated procedures is ultra vires and renders the contract void." *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 499, 886 P.2d 147 (1994). Moreover, "[a] contract in conflict with statutory requirements is illegal and unenforceable as a matter of law." *Id*.

State statute outlines DOT's authority to sell surplus land. The legislature expressly limited DOT's authority by enacting RCW 47.12.063(2)(g), which permits a sale to "[a]ny abutting private owner *but only after each other abutting private owner (if any), as shown in the records of the county assessor, is notified in writing of the proposed sale*." (Emphasis added.) "If more than one abutting private owner requests in writing the right to purchase the property within fifteen days after receiving notice of the proposed sale, the property shall be sold at public auction in the manner provided in RCW 47.12.283." *Id*. Pursuant to the statute's plain language, DOT can

sell land *only* after giving notice.

The majority states: "If in this case the State was generally authorized to sell the surplus property, its act of doing so was not ultra vires." Majority at 5-6. This statement frames the matter too broadly. DOT is not, in fact, generally authorized to sell surplus property; it is generally authorized to sell surplus property only after giving notice. Failing to comply with the notice requirement brings the sale beyond the scope of power granted by the legislature and, unmistakably, in direct violation of existing statute. DOT did not have the authority to sell the land to SUD without first notifying abutting landowners.

The majority states that "a government action is truly ultra vires only if the agency was without authority to perform the action," majority at 4; or "'[A]n ultra vires act is one performed without any authority to act on the subject,'" *id*. at 5 (quoting *Haslund v. City of Seattle*, 86 Wn.2d 607, 622, 547 P.2d 1221 (1976)); or finally, "'An act of an officer which is within his realm of power, albeit imprudent or violative of a statutory directive, is not ultra vires,'" *id*. at 4-5 (quoting *Bd. of Regents v. City of Seattle*, 108 Wn.2d 545, 552, 741 P.2d 11 (1987)).

Under the majority's interpretation, the State can never act ultra vires in selling land because it can sell land broadly. This interpretation erases the notice requirement from the statute. From now on DOT can simply sell to whomever it chooses without notice to other abutting landowners, in violation of RCW 47.12.063(2)(g). What other

statutory limitations can the State ignore?

RCW 47.12.063(2)(g) requires DOT to give South Tacoma written notice of the sale so it could participate in a public auction. DOT had no authority to sell the surplus property without notice. Because DOT's unauthorized act lay outside its realm of power and beyond its authority, its sale to SUD was ultra vires.[2]

South Tacoma also argues that even if the act were within an agency's authority, violating statutory requirements would render an agency contract ultra vires and void. South Tacoma points to *Failor's Pharmacy v. Department of Social & Health Services*, 125 Wn.2d 488, 499 886 P.2d 147 (1994), to support its argument. The majority dismisses the value of *Failor's*, however, by arguing the case determined "remedy" rather than "voidness." Majority at 7-8. While I do not think the difference is sufficiently distinguishable, the majority's approach nonetheless misinterprets *Failor's* pedigree. *Failor's* relied on *Hederman v. George*, 35 Wn.2d 357, 212 P.2d 841 (1949), for the proposition upon which South Tacoma relies. *See Failor's*, 125 Wn.2d at 499. But *Hederman* did not provide a "remedy." *Hederman* explicitly addressed whether a "contract which is contrary to the terms and policy of an express legislative enactment is illegal and unenforcible." *Hederman*, 35 Wn.2d at 362.

[2] The majority asserts DOT's failure to give notice constituted merely a procedural irregularity. Majority at 6. Again, this position ignores RCW 47.12.063(2)(g)'s express limitation on DOT's authority. DOT would have arguably committed a procedural irregularity, for example, by giving oral, instead of written, notice. *See* RCW 47.12.063(2)(g).

Accordingly *Failor's* roots remain intact. DOT's failure to comply with the requirements of RCW 47.12.063(2)(g) renders the sale to SUD void and unenforceable.

II. Bona Fide Purchaser

The bona fide purchaser doctrine states that "a good faith purchaser for value, who is without actual or constructive notice of another's interest in the property purchased, has the superior interest in the property." *Tomlinson v. Clarke*, 118 Wn.2d 498, 500, 825 P.2d 706 (1992) (citing *Glaser v. Holdorf*, 56 Wn.2d 204, 209, 352 P.2d 212 (1960)).

Whether the bona fide purchaser doctrine can cure, via equitable means, the State's ultra vires action appears to be a matter of first impression.[3] I agree with the Court of Appeals, which held that status as a bona fide purchaser does not remedy DOT's ultra vires action. I would hold the bona fide purchaser doctrine does not apply to contracts that are ultra vires.

As the Court of Appeals pointed out, we have held that other equitable principles, including equitable estoppel, cannot be used for relief when the State has improperly exceeded its statutory authority. *See S. Tacoma Way, LLC v. State*, 146

[3] I note that the bona fide purchaser doctrine, in its customary use, does not apply here. The doctrine applies when two or more putative titleholders assert competing superior ownership interests in property. In this case, there is only one putative titleholder: SUD. South Tacoma merely seeks an opportunity to bid on the property at auction. SUD attempts to use the bona fide purchaser doctrine to cure an ultra vires act—a use beyond the doctrine's intended scope.

Wn. App. 639, 653, 191 P.3d 938 (2008) (citing *Finch*, 74 Wn.2d at 172); *see also Chem. Bank*, 102 Wn.2d at 910 ("[U]njust enrichment theory cannot be applied against a municipality where the acts are substantively ultra vires."). This has been the law for more than a century. *See, e.g., Louisville, N.A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U.S. 552, 567, 19 S. Ct. 817, 43 L. Ed. 1081 (1899) ("A railroad corporation, unless authorized by its act of incorporation or by other statutes to do so, has no power to guaranty the bonds of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly ultra vires, unlawful and void, and incapable of being made good by ratification or estoppel.").

I would extend the same principles here. It does not make sense to allow the bona fide purchaser doctrine to make good an action wholly beyond DOT's authority in the first place.[4]

[4] The majority relies exclusively on *State v. Hewitt Land Co.,* 74 Wash. 573, 586, 134 P. 474 (1913), to hold SUD is a bona fide purchaser. In the majority's words, *Hewitt* held that "absent fraud, *and where the State has general authority to sell the land*, a good faith purchaser has the right to rely on the resulting deed." Majority at 12 (emphasis added). Because the State did not have general authority to sell the land without written notice, as articulated above, *Hewitt* does not support the majority.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR: